

IN THE
Supreme Court of The United States

OCTOBER TERM, 1942

No. **830** 26

IRENE BRADY, Administratrix of the Estate of
EARLE A. BRADY, Deceased,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF
NORTH CAROLINA AND BRIEF
IN SUPPORT THEREOF

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PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF NORTH
CAROLINA.

TO THE HONORABLE THE SUPREME COURT OF THE
UNITED STATES:

Your petitioner, Irene Brady, Administratrix of the Estate of Earle A. Brady, deceased, prays this Court to review on writ of certiorari a judgment of the Supreme Court of the State of North Carolina in the case of Irene Brady, Administratrix of the Estate of Earle A. Brady, deceased, v. Southern Railway Company, rendered on the 16th day of December, 1942, and based upon a written opinion by that Court filed on the same date.

Page references hereinafter made are to the record as printed in the court below, as supplemented by the printed proceedings and opinion in the court below.

PART I. SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED.

Petitioner brought this action in the state court of North Carolina under the Federal Employers' Liability Act, 45 USCA Sec. 51, et seq. to recover damages for the death of her intestate on December 25, 1938, resulting from the negligence of the defendant carrier, while the deceased was engaged in the course of his employment as a brakeman in interstate commerce.

At about 5:50 o'clock on the morning of December 25, 1938, the deceased and the other members of the defendant's freight train crew were handling a switching operation of freight cars on a storage or pass track just east of and parallel to the northbound main line track of the defendant's railroad at Hurt, Virginia. "It was still quite dark (R.20). The tracks at this point ran generally north and south, and the pass track was several hundred yards in length. At the north end of the pass track there was located a switch into the northbound main line and about three or four car lengths south of this switch was a derailing device or switch (R.22). This derailer was situated on the east rail of the pass track, and was designed to be used to prevent cars on the pass track from rolling out on the main line, the grade being slightly downhill from south to north. The derailer was constructed for manual operation (R.24-25) and contained a target device as a danger signal for daylight purposes (R.28-29) and a place for a light as a signal at night (R.15,25), but there was no light on the derailer at this time (R.25,59), although one has been placed on it since then, (R.25,28-29). The rule book issued for guidance of the defendant's crews indicated that lights were required on derailleurs (R.90). There is plenary evidence in the record that the west rail of the pass track opposite the derailer on the east rail was defective, thin and badly worn (R.16,30), that the rail was 26 or 27 years old (R.34), and that there was little ballast under and around the cross ties, some of which were old and in poor condition and sloped to the west (R.31). There was also evidence that the derailer itself was shaky and loose (R.15)."

When the train arrived at Hurt, Virginia, from Spencer, North Carolina, it travelled beyond the switch at the north end of the pass track and then backed into this siding to allow another northbound train to pass, the conductor first opening the switch and the derailler (R.75). The deceased closed the switch and derailler and the freight train remained in the pass track while the other northbound train passed (R.20-21, 24-25). Then the deceased opened the switch and derailler and the train pulled back on the main line north of the pass track, immediately backed completely south of the switch, and the deceased cut the train so as to leave four empty cars attached to the back of the engine. The locomotive and these four cars then pulled north past the switch, the deceased opened the main line switch, stepped up on the southeast corner of the lead car, a gondola, and signalled the engineer to back into the pass track where they were to pick up twelve other cars which were already standing in the southern portion of the pass track when the train arrived at Hurt (R.20-21). The lead car upon which the plaintiff's intestate was then standing struck the north or "wrong" end of the derailler which was later found to be set on the east rail (R.23), causing the lead truck of the car to derail. Mr. Brady was thrown under the wheels and instantly killed (R.22).

The record is silent as to who closed the derailler after the deceased opened it to allow the train to pass back out on the main line, nor did any witness testify as to who closed the switch so as to allow the train to back south on the main line prior to cutting the train. However, the evidence is clear and uncontradicted that on this movement north out of the pass track the deceased was on one of the four cars just behind the engine (R.25,75). The defendant contended that when the train was first backed into the side track the conductor and flagman (Brandt and Scruggs) left the caboose to cover a road crossing and release the brakes of the twelve cars to be picked up from the storage track, while the plaintiff contended that at least one of them stayed on the caboose (36 or 37 cars behind the locomotive) at the back (south end) of the train where the main line switch had to be closed before

the train backed south to the place where it was cut between the fourth and fifth cars by the deceased. The testimony of the conductor, Brandt, was not unequivocal on this point (R.75).

There was no evidence that the deceased was familiar with the tracks and switches at Hurt, Virginia. He was a part time extra trainman (R.14,95). On the occasion of the derailment it was dark and no opportunity existed for the deceased to inspect the rails and track bed.

In the trial below the plaintiff contended that the conductor or flagman, without notice to the deceased, negligently reset the derailer after the deceased opened it to allow the train to proceed out of the pass track; that the defendant negligently failed to equip the derailer with a warning light; and that the derailer and adjacent west rail and roadbed were in a defective condition so that a derailment occurred which would not have happened had the track been in good condition (R.116-119). On the other hand, the defendant contended that the track and derailer were in proper condition and that the deceased himself set the derailer and thereafter failed to open it (R.123). Upon issues of negligence, assumption of risk, contributory negligence and damages (R.9) the case was submitted to the jury, who found all issues in favor of the plaintiff and awarded a total recovery of \$20,000.00.

The defendant carrier took an appeal to the Supreme Court of the State of North Carolina where the judgment of the trial court was reversed (R. supplement 11), thereby resulting in dismissal of plaintiff's case.

PART II. JURISDICTIONAL STATEMENT.

The jurisdiction of this Court is invoked under Judicial Code, Section 237 (b), amended, 28USCA Sec. 344, to have determined the petitioner's right specially set up and claimed

under a statute of the United States: the Federal Employers' Liability Act, 45 USCA Sec. 51, et seq., providing for the recovery of damages by the personal representative of a person suffering death while employed by a railroad common carrier and engaged in interstate commerce, when such death results in whole or in part from the negligence of such carrier or its agents. The date of the judgment sought to be reviewed is December 16, 1942, and it was rendered by the Supreme Court of the State of North Carolina, the state court of last resort. The date when this petition is filed is March 15, 1943.

Since the petitioner's right to recover damages is founded upon a statute of the United States and the ruling of the Supreme Court of the State of North Carolina amounts in substance to a denial of such right, this Court should review and reverse the decision of the court below. *Norman v. Baltimore & Ohio R. Co.*, 294 U.S. 240, 79 L. ed. 885, 55 S. Ct. 407; *Norris v. Alabama*, 294 U.S. 587, 79 L. ed. 1074, 55 S. Ct. 579; *Great Northern R. Co. v. Washington*, 300 U.S. 154, 81 L. ed. 573, 57 S. Ct. 397; *Tiller v. Atlantic Coast Line R. Co.*, U.S., 87 L. ed. (Advance Opinions) 446, S. Ct. (decided Feb. 1, 1943).

It is contended that the questions involved in this case and presented by this petition are substantial because of the importance of the effect and scope of the North Carolina court's interpretation of the Federal Employers' Liability Act and the 1939 Amendment thereto (August 11, 1939) 53 Stat. 1404, c. 685, 45 USCA Sec. 54. In this case the North Carolina court has held that as a matter of law (a) there was insufficient evidence of the defendant's negligence being a proximate cause to be submitted to the jury; (b) the negligence of the deceased was the sole proximate cause; (c) the negligence of the deceased resulted in his conclusive assumption of the risk of being killed. The evidence on all of these grounds for the state court decision was highly conflicting and the jury found for the plaintiff on all points. In applying the Act to the facts of this case the state court failed to follow the weight of authority and the decisions of this Court which hold that

proximate cause should be left to the jury's determination. *Louisville and Nashville R. Co. v. Layton*, 243 U.S. 617, 61 L. ed. 931, 37 S. Ct. 456; *Tiller v. Atlantic Coast Line R. Co.*, *supra*; *Crain v. Illinois Central R. Co.* (Mo., 1934) 73 S.W. (2d) 786, *cert. den.*, 293 U.S. 607, 79 L. ed. 698. In the guise of sole negligence of or conclusive assumption of risk by the deceased the North Carolina court has in substance ruled as a matter of law that the conduct of the deceased was such contributory negligence as to bar a recovery by his personal representative and refused altogether to consider the 1939 Amendment as applicable. It is the emphatic contention of the petitioner that this narrow and constrictive interpretation emasculates the Act and the 1939 Amendment and is directly opposed to the legislative intent of Congress as liberally articulated in the opinions of this Court. *Lilly v. Grand Trunk Western R. Co.*, U.S., 87 L. ed. (Advance Opinions) 323, S. Ct.; *Tiller v. Atlantic Coast Line R. Co.*, *supra*. The North Carolina court has obviously applied the narrow state law rule and ignored the Federal decisions which are controlling in the trial of cases under the Federal Employers' Liability Act. *Baltimore and Ohio R. Co. v. Kepner*, 314 U.S. 44, 86 L. ed. 28, 62 S. Ct. 6.

In the trial court the federal questions sought to be reviewed in this Court were raised originally by the pleadings (R.3,5) and were supported by the evidence and admissions of the defendant (R.12-14). The federal questions were all decided in the petitioner's favor in the trial court by the verdict of the jury and judgment of the court (R.9-10). The trial judge overruled the defendant's motions for dismissal as of nonsuit (R.53, 103), and submitted the case under full instructions relating to the applicability of the Federal Employers' Liability Act (R.107-109, 125-130, 133-137). In the Supreme Court of the State of North Carolina these questions were raised by the defendant's ten assignments of error (R.143-150), the defendant placing chief reliance upon its seventh assignment of error to the refusal of the trial court to allow its motion for judgment of nonsuit (R.148). It was upon this assignment of error that the North Carolina appellate

court reversed the judgment and directed a dismissal of the case (R. supplement 1-10).

PART III. QUESTIONS PRESENTED.

(1) Did the Supreme Court of the State of North Carolina err in holding as a matter of law that there was no evidence, sufficient to support the jury's verdict, of the defendant's negligence being a proximate cause of the occurrence which resulted in the death of petitioner's intestate?

(2) Did the court below err in ruling as a matter of law that the actions of the deceased were such negligence on his part as to constitute the sole proximate cause of his death, and that his conduct was such as to compel a conclusive presumption that he assumed the risk of being killed, so as to bar recovery?

(3) Was it error for the court below to hold that the 1939 Amendment to the Act was inapplicable?

PART IV. REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The reasons why the petitioner contends that the writ should be granted in this case are partially stated in the last two paragraphs of Part II of this petition. The exact reasons upon which the petitioner relies may be summarized as follows:

(1) The Supreme Court of the State of North Carolina has usurped the province of the jury, contrary to the spirit and purpose of the Act under which the petitioner asserts her right. Upon controversial evidence from which reasonable, fair-minded men might draw different inferences the issue of the defendant's negligence was properly left to the jury to decide, and the appellate court below had no authority to redraw the inferences, substituting its interpretation of the facts.

for that of the jury. *Jones v. East Tennessee, V. and G. R. Co.*, 128 U.S. 443, 445, 32 L. ed. 478, 479, cited with approval in *Tiller v. Atlantic Coast Line R. Co.*, *supra*. Indeed, it is submitted that the preponderance of the evidence supports the conclusion of the jury rather than that of the North Carolina court. In its opinion the court below said that striking a derailer from the wrong direction was so unusual, and so contrary to the purposes for which the derailer was used, the railroad company was not under a duty to foresee an occurrence such as the one in this case; that, therefore, it was not actionable negligence for the defendant to use an opposite rail which was worn (R. supplement 6-8). Yet the record discloses that the defendant's own division superintendent had seen twenty-five to fifty such occurrences, about half of which resulted in derailments (R.65).

(2) The decision of the court below found as a matter of law that the deceased set the derailer back on the east rail, or that he neglected to open it before signalling the engineer to proceed with the backing of the four cars into the pass track (R. supplement 4, 9). Not a witness testified that the deceased set the derailer, but on the contrary the circumstantial evidence regarding this matter impels the conclusion that it was probably set by that one of the train crew (other than the deceased, because he was at all times on one of the four cars next to the engine) who closed the switch so that the entire train could be backed up south on the main line for the cut off of the four cars and locomotive. The statement in the court's opinion that the deceased "closed the switch for the movement of the train south on the main line" (R. supplement 4) is totally lacking in evidence to support it. Not a witness so testified. This person was at the back of the train, 32 or 33 cars behind the ones upon which the deceased was located at all times. There is no evidence that the deceased had any notice of the fact that the derailer had been reset after he opened it, and since it was not equipped with a light he could not see it in the dark. He had no opportunity to inspect it or the adjacent track and roadbed. Even conceding that the deceased should have first ascertained whether the derailer had

been reset after he opened it, at most his conduct would have amounted only to contributory negligence which would have diminished but not barred recovery. Federal Employers' Liability Act, 45 USCA Sec. 53. The court below characterized as assumption of risk what was in substance its finding of fact with regard to the deceased's conduct, and this tortuous construction of Sec. 54 should be stricken down by this Court.

(3) It is the contention of the petitioner that the 1939 Amendment to the Federal Employers' Liability Act, *supra*, was intended to require that all cases thereafter "tried under the Federal Act be handled as though no doctrine of assumption of risk had ever existed." *Tiller v. Atlantic Coast Line R. Co.*, *supra*, at p. 452 of the L. ed. Advance Opinions. It is submitted that the Amendment was designed to have retroactive effect and remove the defense of assumption of risk from all cases, irrespective of when the injury or death of the employee occurred. Of course, this question does not appear from the record to have been raised by the petitioner in the trial court, but it did not become material to this case until the decision of the appellate court below was rendered. The petitioner has waived no rights and is not estopped to insist now that the Supreme Court of the State of North Carolina erred in basing its decision, in part at least, upon an incorrect interpretation of the 1939 Amendment. The petitioner has no quarrel with the result in the trial court, because the error against her in submitting the question of assumption of risk was rectified by the jury's verdict. *Lilly v. Grand Trunk Western R. Co.*, *supra*. The tenor of the ~~entire~~ opinion of the North Carolina court indicates that its basic reason for upsetting the jury's verdict was its conclusion from the evidence that the deceased assumed the risk (meaning he was guilty of contributory negligence), because he either set the derailler or failed to take heed that it had been set by another. This ruling conflicts with the opinions of this Court cited above.

WHEREFORE, because the decision and judgment of the Supreme Court of the State of North Carolina decided the foregoing propositions contrary to the general Federal law

and the decisions of this Court, and erroneously interpreted and applied the Federal Employers' Liability Act, Amended, so as to substantially deny to the petitioner the right which she asserts thereunder, your petitioner, upon this petition, the annexed brief, and the certified record as printed for the court below, together with the printed proceedings and opinion of the Supreme Court of the State of North Carolina, prays that a writ of certiorari be issued, to the end that this cause may be reviewed and determined by this Court, and that upon such review the judgment of the Supreme Court of the State of North Carolina be reversed and that of the trial court affirmed.

IRENE BRADY, Administratrix of
the Estate of Earle A. Brady,
Deceased,

Petitioner.

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No.

IRENE BRADY, ADMINISTRATRIX OF THE
ESTATE OF EARLE A. BRADY, DECEASED,
Petitioner,

versus

SOUTHERN RAILWAY COMPANY.

**BRIEF IN SUPPORT OF PETITION FOR WRIT
OF CERTIORARI.**

I. OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of the State of North Carolina is reported in 222 N. C. 367, 23 S. E. (2d) 334. The opinion is also appended to the record filed with this Court (R. supplement 1, *et seq.*).

II. JURISDICTION.

The jurisdiction of this Court is invoked under Judicial Code, Section 237 (b), Amended, 28 USCA Sec. 344, to have determined the petitioner's right specially set up and claimed under the Federal Employers' Liability Act, Amended, 45 USCA Sec. 51, *et seq.*, a statute of the United States.

III. STATEMENT OF CASE.

The petition to which this brief is annexed contains a concise statement of the relevant facts, and they will not be repeated in this brief except where necessary to consideration of the questions presented and discussed.

IV. ARGUMENT.

Summary.

The decision of the court below should be reviewed and reversed because (1) it applies a test of the sufficiency of the evidence of the defendant's negligence to go to the jury which conflicts with the general Federal law and the decisions of this Court, in effect substituting the verdict of the court for that of the jury; (2) it holds as a matter of law that acts of the deceased constituted the sole proximate cause of his death and that he should be conclusively deemed to have assumed the risk caused by his own alleged negligence, notwithstanding that the evidence was conflicting and at most would have justified simply a finding of contributory negligence; and (3) it fails to apply properly the 1939 Amendment to the Federal Employers' Liability Act (August 11, 1939) 53 Stat. 1404, c. 685, 45 USCA Sec. 54, so as to eliminate from the case all consideration of the repudiated doctrine of assumption of risk in all its forms, but on the contrary relies on assumption of risk to bar recovery.

(1) *The Evidence of Defendant's Actionable Negligence Was Ample and the Jury's Findings Thereon Should Have Remained Undisturbed.*

The plaintiff introduced the evidence of several witnesses who testified that the rail immediately opposite the derailler was an ancient one and in a defective condition (R. 16, 30, 34). It was 24 years old when taken out of the defendant's main line track in 1936 and installed at Hurt, Virginia (R.62), and the underlying roadbed was in bad condition (R.31). The derailler itself was not equipped with a signal light, although designed for one (R. 15, 25, 59). The plaintiff introduced the evidence of two expert witnesses who testified in response to properly framed hypothetical questions that in their opinion, based upon many years of railroading experience and also observation of similar occurrences, the derailment which resulted in the death of plaintiff's intestate was caused by the defective rail opposite the rail upon which the derailler was set: that the derailment would not have occurred if the west

rail had not been defective (R.37-38, 39, 45, 46). The derailer had a groove on the north or "wrong" end which would have carried the wheel on over and back on the east rail if the west rail had not been defective (R. 41-42, 46). This evidence was unquestionably competent and admissible, *McGraw v. Southern R. Co.*, 206 N. C. 873, 175 S. E. 286; 209 N. C. 432, 184 S. E. 31, and was adequate to take the case to the jury. When the court below held otherwise and reversed the trial court, the decision was contrary to the general Federal law and the decisions of this Court. *Tiller v. Atlantic Coast Line R. Co.*, U.S., 87 L. Ed. (Advance Opinions) 446, S. Ct.; *Davis v. Wolfe*, 263 U.S. 239, 68 L. Ed. 284, 44 S. Ct. 64; *Cooley v. New York Central R. Co.* (C.C.A., N.Y. 1936), 80 F. (2d) 816, cert. den. 297 U.S. 721, 80 L. Ed. 1005, 56 S. Ct. 599; *Young v. Wheelock*, 333 Mo. 992, 64 S.W. (2d) 950, cert. den. 291 U.S. 676, 78 L. Ed. 1064.

The holding in the opinion of the court below that the consequences which might follow from a car being backed over the "wrong" end of a derailer set opposite a defective rail could not reasonably be foreseen by the defendant is directly opposed to the evidence. The defendant's superintendent had seen twenty-five to fifty instances of cars backed over the wrong end of derailers (R.65).

It is submitted that the Supreme Court of the State of North Carolina has, in this instance, wholly failed to follow the controlling principles of law applicable to this type of case in measuring the sufficiency of the evidence of defendant's actionable negligence.

- (2) *It Was Error to Hold as a Matter of Law That the Deceased Was Guilty of Negligence Which Was the Sole Proximate Cause of His Death and Which Gives Rise to a Conclusive Presumption That He Assumed the Risk of Injury.*

The lips of the deceased were sealed forever when this tragedy occurred, and he cannot relate what he did prior to the derailment. However, no witness came forward and said that the deceased reset the derailer on the east rail of the pass track after he opened it and the main line switch to enable

the entire train to re-enter the main line. The evidence tends to point to another member of the train crew (R.75). It is conceded that the evidence is circumstantial, but it is certainly susceptible of more than one reasonable inference. *Cooley v. New York Central R. Co.*, *supra*. Therefore, the matter was properly referred to the jury, and the court below erred in assuming to invade this exclusive province of the jury. It was for the twelve to say whether the deceased by his own act or omission caused his death. *Tiller v. Atlantic Coast Line R. Co.*, *supra*.

In effect the Supreme Court of the State of North Carolina has mislabeled what it conceived to be the actions of the deceased. He could not have assumed the risk when there was none without an overt act of commission or omission on his part. The court below ran afoul of what this Court describes in the *Tiller case*, *supra*, as "the great uncertainty existing prior to the Act [1939 Amendment abolishing assumption of risk] as to what the margin between these doctrines [contributory negligence and assumption of risk] was . . ." Contributory negligence would not have prevented recovery by the plaintiff, Sec. 53 of the Act; nor should recovery be denied through the simple expedient of giving it another name: assumption of risk.

The same criticism of the decision below which was made on the question of the defendant's negligence is applicable on the issue of the alleged negligence of the deceased—it was a disputed question of fact and the jury resolved it in favor of the plaintiff. This result should not have been disturbed.

(3) *The Amendment of 1939 Was Intended To Be Retroactive and the Court Below Should Have Given It This Application.*

The 1939 Amendment to the Act under which this suit was brought inserted the language which is in italics in the following quotation of Sec. 54 of the Act:

"That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of

its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

When Congress enacted this revision of the law, no saving or exclusion clause with reference to pending claims or litigation was included, nor did the amendment specify that it was to become operative at some future date or with respect only to a particular class of such cases. The Amendment was manifestly intended to clarify the existing section of the statute and give it a meaning consistent with the beneficial purposes which the Act was designed to achieve. Judicial construction of the original Sec. 54 had produced results not contemplated when the statute was first enacted. *Tiller v. Atlantic Coast Line R. Co., supra.*

In the decision of the North Carolina court the term assumption of risk is actually used to denote a means of appraising the defendant's negligence (as well as the alleged contributory negligence of the deceased). This analysis is suggested by the *Tiller case, supra.* Since this is true, if the 1939 Amendment to the Act completely eliminated the concept of assumption of risk, irrespective of the date when the accident may have occurred, this Court should review this case in order to weigh the defendant's negligence on a scales not affected by the weight of a discarded doctrine. Furthermore, the court below specifically ruled that the 1939 Amendment was inapplicable (R. supplement 9) to this case, and the petitioner contends that this holding runs counter to the express intent of Congress.

The 1939 Amendment abolished the defense of assumption of risk. In other words, from the moment it became law railroad carriers sued under the Act were deprived of the right to plead and rely upon this defense which was formerly available to them. Congress evidently intended to ameliorate im-

mediately the morally unacceptable proposition that a man compelled by economic circumstances to follow a hazardous employment did so with full knowledge and hence had to bear the consequences attendant upon the risks. *Tiller v. Atlantic Coast Line R. Co.*, *supra*, footnotes 20-22, inclusive. To give the Amendment the retroactive application which is suggested would deprive the defendant of no right in this case. The petitioner contends that the defendant's negligence should be ascertained solely from the evidence relating to its failure to keep and maintain its equipment in proper condition, and if such dereliction of duty be found (as it was by the jury), then the defendant should not escape its responsibility to the family of the deceased by interposing a defense abolished fifteen days after this suit was instituted and long before the case was tried, or decided by the state appellate court. It is submitted that the 1939 Amendment automatically removed this defence from all cases not previously adjudicated.

Conclusion.

For the reasons set forth in the petition for writ of certiorari and in this brief, and in order that the petitioner may not be deprived of her right under the United States statute, it is respectfully submitted that the supervisory powers of this Court should be exercised to correct the erroneously grounded decision of the Supreme Court of the State of North Carolina; that a writ of certiorari should be granted; and that thereafter the case should be considered and the judgment and decision of the North Carolina court reversed and the judgment of the trial court affirmed.

Respectfully submitted,

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